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Supreme Court, U.S.
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Supreme Court of the United States

October Term, 1960

No. 224

ENRIQUE ESTEBAN GANDUXE y MARINO,
Petitioner,

against

P. A. ESPERDY, District Director of the Immigration and Naturalization Service for the New York District,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MORTON SILFEN,
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BRANDON & SILFEN,
Of Counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petition of Enrique Esteban Ganduxe y Marino respectfully shows to this Court and alleges:

Opinion Below

The order sought to be reviewed was made and entered on April 13, 1960. The opinion of the United States Court of Appeals for the Second Circuit and the decision of the United States District Court reviewed by the Court of Appeals are not as yet officially reported.

Jurisdiction

Jurisdiction to review in the manner set forth herein is granted this Court by 28 U. S. C. Section 1254(1). Jurisdiction of the District Court is claimed under Section 10 of the Administrative Procedure Act, 5 U. S. C. A. Section 1001, *et seq.*

Questions Presented

The questions presented for review are as follows:

(a) Whether the alleged omission of the petitioner in his visa application of his conviction of the offense of disorderly conduct, specifically, loitering for the purpose of inducing men to commit acts against nature *per se* constitutes a material misrepresentation within the meaning of the Immigration and Nationality Act where the testimony of the Petitioner is that he is not a homosexual or has ever committed acts of homosexuality, that he was not guilty of the offense charged, that the plea of guilty on which the conviction was based was entered when he was without counsel and unaware of the nature of the charge to which he was pleading guilty?

(b) Whether the omission from the Order to Show Cause by which the deportation proceedings were commenced of the time and place of the hearing as required by the pertinent regulations requires that the order of deportation be set aside though petitioner was subsequently notified by registered mail of the time and place of the said hearing which procedure was unauthorized by the prevailing regulations?

(c) Whether the petitioner received a fair and proper hearing where he was denied an opportunity to cross-examine or to take the depositions of government employees whose affidavits were admitted into evidence for the purpose of showing the general practice in the United States Consulate which issued the visa?

Statutes Involved

The relevant sections are:

Immigration and Nationality Act, Section 212 (8 U. S. C. Section 1182(a)):

"Section 212. General Classes of Aliens Ineligible to Receive Visas and Excluded from Admission

(a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * (4) Aliens afflicted with psychopathic personality, epilepsy, or a mental defect;

* * * (9) Aliens who have been convicted of a crime involving moral turpitude (other than a purely political offense), or aliens who admit having committed such a crime, or aliens who admit committing acts which constitute the essential elements of such a crime; * * *

* * * (13) Aliens coming to the United States to engage in any immoral sexual act;

* * * (15) Aliens who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission, are likely at any time to become public charges;

* * * (19) Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact; * * *."

Section 4 of Public Law 770, 83rd Cong. 2nd Sess., 8 U. S. C. Section 1182(a):

"Any alien who is excludable because of the conviction of a misdemeanor classifiable as a petty offense under the provisions of section 1(3) of Title 18, by reason of the punishment actually imposed, or who is excludable as one who admits the commission of such misdemeanor, may on or after September 3, 1954, be granted a visa and admitted to the United States, if otherwise admissible: provided that the alien has committed only one such offense."

Title 18 U. S. C. Section 1(3):

> "• • • Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500., or both, is a petty offense."

New York Penal Law, Section 722(8), McKinney's Consolidated Laws of New York:

722, Disorderly Conduct:

> "Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:
>
> • • • (8) Frequents or loiters about any public place soliciting men for the purpose of committing a crime against nature or other lewdness; • • •."

Statement of the Case

This is an action instituted by petitioner in the United States District Court, Southern District of New York, petitioning for a declaratory judgment pursuant to Section 10 of the Administrative Procedure Act (5 U. S. C. 1001, *et seq.*) of an order requiring the petitioner to voluntarily depart from the United States, or in lieu thereof, be deported. The order has become final by virtue of affirmance by the Board of Immigration Appeals. Petitioner appeals from an order of the United States Court of Appeals affirming the judgment of the United States District Court denying petitioner's motion for an injunction *pendente lite* and granting respondent's motion for summary judgment. Petitioner is a male alien, a native and citizen of Cuba, who last entered the United States at Tampa, Florida, on November 28, 1955, when he was admitted for permanent residence. Petitioner was in possession of an immigration visa issued to him by the U. S.

Vice Consul at Havana, Cuba. Deportation proceedings were instituted against the petitioner pursuant to an order to show cause, charging the petitioner as being deportable under Section 241(a)(1) of the Immigration and Nationality Act, in that at the time of entry in 1955, he was excludable from admission by the law then existing. The basis of the proceedings was a conviction for the offense of disorderly conduct, specifically, loitering for the purpose of inducing men to commit acts against nature, while a visitor to the United States in November, 1953. He was sentenced to a fine of $25, or in lieu thereof, to ten days in the city jail, and he paid the fine. The Service alleges that the petitioner wilfully failed to state the said conviction in his application for the immigration visa.

In the deportation proceedings, the petitioner testified that he was not a homosexual, had never committed homosexual acts and did not accost the police officer or any other person for the purpose of committing homosexual acts (Administrative Rec., p. 6). He testified that he was innocent of the charge of loitering for the purpose of inducing men to commit acts against nature and had pleaded guilty only because, at that time he was not represented by counsel, he was unaware of the true nature of the charge and thought that he was charged with an offense solely involving being drunk and disorderly and showing disrespect to public authorities (Administrative Rec., pp. 14, 15). A letter from a qualified psychiatrist was introduced in evidence stating that petitioner is not suffering from a psychiatric disorder nor is he affected by overt homosexuality (Petitioner's Exhibit R-3). Petitioner offered to submit to psychiatric examination by any qualified psychiatrist of the United States Public Health Service (Administrative Rec., p. 34). The Board of Immigration Appeals held that it was immaterial whether or not the petitioner was a homosexual and that the determining factor of materiality was that the misrepresentation allegedly cut off an investigation by the Vice Consul in determining whether petitioner was entitled to issuance of a visa.

The petitioner's counsel further requested that the deportation proceedings be deferred in order that he might institute *coram nobis* proceedings to vacate and set aside the guilty plea to the disorderly conduct charge on the ground that in pleading guilty petitioner was unaware of the nature of the proceedings and was not represented by counsel (Administrative Rec., p. 34). The Special Inquiry Officer denied the application, ruling that even the setting aside of the conviction would not remove the basis of deportability.

The Immigration and Naturalization Service introduced into evidence a record of the arrest and conviction of the petitioner in the Magistrates' Court, an F. B. I. report of the fingerprints taken of the petitioner, the preliminary questionnaire and the visa application, and a purported four-page sworn statement taken from petitioner. Petitioner's counsel objected to the introduction of the record of conviction and the F. B. I. report on the ground that the conviction involved an offense and any misrepresentation made with respect to the same would be immaterial as it would not make petitioner ineligible for a visa. Counsel further objected that there was nothing to show that the record of conviction referred to petitioner, as it was in the name of "Henri Girduxe".

The petitioner testified with respect to the visa application that he did not give the answer that he was never arrested or convicted of the crime, nor did he ever read the application (Administrative Rec., p. 10). He stated that he was furnished by the consulate with a list of documents, and the preliminary questionnaire, which he took to an attorney. The attorney prepared the questionnaire with the assistance of documents which had been turned over to him by the petitioner (Administrative Rec., p. R-4). The petitioner did not read the preliminary questionnaire and signed it in blank (Administrative Rec., p. R-4). The petitioner then brought the papers to the consulate, where they were checked by a consular official, but did not discuss

the questions with him (Administrative Rec., pp. R-3 and R-4). The petitioner testified that he was never asked in his visits to the consulate to submit a certificate of good conduct from the New York City Police Department (Administrative Rec., p. 17). He further testified that the visa application was completed by a typist in the consulate from a file and signed by him without his being specifically asked the questions pertaining to the arrest and conviction (Administrative Rec., pp. 17, 18). At the conclusion of the hearing, the Special Inquiry Officer denied the petitioner's request that his counsel be allowed to take a deposition of and cross-examine the Vice Consul who issued the visa and the stenographer who typed the visa (Administrative Rec., p. 35).

At a re-opened hearing, the Service introduced the depositions of the Vice Consul and stenographer. The affidavit of the Vice Consul stated that he had interviewed the petitioner with respect to the visa application and that petitioner had advised him that he had not resided in more than one city of the United States for more than a three-month period. He added that if he had been advised that petitioner had resided in any city of the United States for more than three months, it would be the practice of the visa office to require a police certificate from that place. The affidavit of the stenographer stated it was the practice of her office and her specific duty to ask the applicant, in accordance with the prescribed language of the visa application, the question if he had ever been arrested (Administrative Rec., decision of Special Inquiry Officer, February 10, 1958, pp. 3, 4). The Special Inquiry Officer admitted only those specific portions of the affidavits as dealt with the general practice of the visa office. Petitioner's counsel objected to the introduction of the affidavits on the ground that they were hearsay and that even for the specific purpose for which they were offered, petitioner had no opportunity to show departures from general practice, or to cross-examine the affiants, but the objection was overruled (Administrative Rec., pp. R-10, R-11).

Reasons for Allowing the Writ

The basis for Federal jurisdiction is that the Federal Immigration Authorities are about to request the petitioner to voluntarily depart from the United States or in lieu thereof to take petitioner into custody and deport him from the United States. Petitioner contends that he is being deported in deprivation of his rights in that he is not within the class of deportable persons under the pertinent statutes and that he did not receive a fair and proper hearing. An action was commenced in District Court for a declaratory judgment and an injunction.

The allowance of the writ of certiorari is thought to be justified on the following grounds:

1. In holding that the petitioner's false statement in his visa application constitutes a material misrepresentation, the Courts below decided the questions of importance in the interpretation of the Immigration and Nationality Act in a manner inconsistent with precedent, and contrary to the interests of justice. The Court below sustained the ruling of the Special Inquiry Officer and the Board of Immigration Appeals that the Petitioner's false statement was a misrepresentation of a material fact, not because a statement as to the true facts would have made the Petitioner ineligible for a visa, but on the grounds that the alleged false statement prevented an investigation which might well have resulted in the exclusion of petitioner as an alien afflicted with a psychopathic personality. In so doing the Courts and the Immigration Service held that the affirmative evidence in the record that petitioner did not possess any homosexual or psychopathic tendencies was not at all pertinent. In the deportation proceedings, the petitioner testified that he was not a homosexual, that he did not have homosexual tendencies nor did he ever accost any person for the purposes of committing homosexual or other unnatural sexual acts (Administrative Rec., p. 16).

He testified that he is innocent to the offense to which he pleaded guilty and that the guilty plea was made at a time when he was not represented by counsel and was unaware of the true nature of the charge to which he was pleading guilty (Administrative Rec., pp. 14, 15). Further evidence that petitioner was not an inadmissable alien included a letter from a qualified psychiatrist that the petitioner did not possess psychiatric or homosexual tendencies (Petitioner's Exhibit R-3). Petitioner was examined by the medical officer of the U. S. Consulate at the time of his visa application and offered to submit to psychiatric examination by any qualified psychiatrist of the United States Public Health Service (Administrative Rec., p. 34). Petitioner's request that the deportation proceeding be deferred in order that he might institute *Coram Nobis* proceedings to vacate and set aside the conviction was denied on the ground that even if the conviction was set aside, the ground of deportability would not be removed (Administrative Rec., p. 34).

Misrepresentations not material to the questions of eligibility of the alien to obtain a visa has been held not to make the alien deportable on the ground of having obtained the visa by fraud or by misrepresentation. For a misrepresentation to be deemed material, the record must show that if the true facts were stated, the alien was either ineligible for admission or probably would have been ineligible for admission. *U. S. ex rel. Liebowitz* v. *Schlotfeldt*, 94 F. 2d 263 (C. A. 7th Circuit, 1938); *U. S. ex rel. Fink* v. *Reimer*, 96 F. 2d 217 (C. A. 2, 1938); *U. S. ex rel. Iorio* v. *Day*, 34 F. 2d 920 (C. A. 2, 1929); *In re Field's petition*, 159 F. Supp. 144 (U. S. Dist. Ct. S. D. N. Y. 1958); *Matter of C-T-P Interim Decision #953*, decided by the Board of Immigration Appeals, September 19, 1958.

In *In re Field's Petition*, 159 F. Supp. 144 (U. S. Dist. Ct. S. D. N. Y. 1958) the Petitioner concealed the fact that she resided in Russia. The State Department

said that the visa would not have been issued if a true statement had been made in the visa application. The Court, in holding that the petitioner had been lawfully admitted for permanent residence said:

> "The Immigration and Naturalization Service has done no more than to indicate that if the truthful answer had been made by petitioner on her visa application, an investigation might have been instituted. They have offered nothing to show that an investigation might have resulted in a proper refusal of the visa." 159 F. Supp. 144, 147. Also see *U. S. ex rel. Fink* v. *Reimer*, 96 Fed. 2d 217 (C. C. A. 2d, 1938); *U. S. ex rel. Iorio* v. *Day*, 34 Fed. 2d 920 (C. C. A. 2, 1929).

Administratively the Board of Immigration Appeals has set forth the following pertinent criteria:

> "If the misrepresentation is concerning a ground which requires a weighing and balancing of intangible factors giving the consul measure of discretion, as for example, whether an applicant is a believer in a subversive doctrine or a psychopathic personality, or one likely to become a public charge, then it is not necessary that the record establish that the ground actually did exist: It is sufficient if the record establishes that the ground of the inadmissibility probably existed." *Matter of C-T-P Interim Decision #953*, decided by the Board of Immigration Appeals September 19, 1958. (See Appendix)

The decision of the Court of Appeals should be reviewed by this Court since apart from the guilty plea, there is no evidence that the petitioner is afflicted with a psychopathic personality, has homosexual tendencies or was guilty of the offense as charged. With respect to the plea of guilty the petitioner contends that he was unaware of the nature of the offense to which he pleaded

guilty. As the Board of Immigration of Appeals stated in the *Matter of C-T-P*:

> "The fact that further investigation was prevented does not make a misrepresentation material (*In re Field's Petition*, 159 F. Supp. 144, S. D. N.Y., 1958; *Matter of S— C—*, E-086114, Int. Dec. No. 763). The mere possibility of a refusal does not make a misrepresentation material. A review of the cases shows that in some situations it is the actual existence of a ground of inadmissibility and in others the *probable* existence of a ground of inadmissibility which makes the misrepresentation material." *Matter of C-T-P Interim Decision #953* by the Board of Immigration Appeals, September 19, 1958.

To hold the petitioner deportable under the foregoing circumstances would constitute a holding that a misrepresentation is material if only the possibility of denial of a visa existed. Such a holding would affect the rights of thousands of aliens who made some misstatement in their visa applications. The Board of Immigration Appeals stated in the *Matter of C-T-P*:

> "We believe the rule stated in *Field* should be followed. It is the majority rule. It is the rule which has been followed since at least *Iorio* (1929), (*Matter of S—C—*, *supra*, p. 18). Years of settled judicial and administrative practice, taking into consideration the general background of immigrants, the fact that they are often ill-advised, the financial and emotional expense with which they have uprooted their ties in their native land, and the hardship of requiring the established ties in this land to be broken require caution and consideration to be used in finding misrepresentations material when made in an application for a visa. Without condoning the making of misrepresentations, but bearing in mind that the factors we have set forth exist, we see no reason to abandon the conservative rule of the past and now subject to deportation all aliens concerning whom *any* possibility of the denial of a visa existed. If the

> rule is to be changed, it should be done by the clear statements of the legislature or the courts and not be implications drawn from solitary cases." *Matter of C-T-P Interim Decision #953*, decided by the Board of Immigration Appeals, September 19, 1958.

We respectfully urge that on this issue alone the issuance of a writ of certiorari is warranted.

2. The decision of the Court of Appeals raises a further issue which should be reviewed by this Court. The proceedings were commenced by issuance and service of an Order to Show Cause. Regulation 8 C. F. R. Sec. 242.1(a) requires that every proceeding to determine deportability shall be commenced with issuance and service of an Order to Show Cause. The regulation further provides that the order shall:

> "Call upon the respondent to appear before a Special Inquiry Officer for hearing at a time and place stated in the Order * * *." 8 C. F. R. section 242(b).

The Order to Show Cause served upon the petitioner fails to indicate the time and place of the hearing (Administrative Rec., p. 2, 3). The Immigration and Naturalization Service attempted to correct its error by registered letter to petitioner of the return date and place of the hearing. Such a proceeding was not authorized by the prevailing regulations.

Section 242(b); 8 U. S. C. 1252(b) provides:

> "* * * proceedings before a Special Inquiry Officer acting under the provisions of this section shall be in accordance with such regulations * * * as the Attorney General shall prescribe * * *
>
> * * * The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien. * * *"

Failure to comply with the procedure required by the statutes and regulations in deportation proceedings requires that the order of deportation be set aside. *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 70 S. Ct. 445 (1950); also see *Bridges* v. *Wixon*, 326 U. S. 135, 65 S. Ct. 1443 (1945); *Marcello* v. *Bonds*, 349 U. S. 302, 75 S. Ct. 757.

Petitioner respectfully submits that to permit the decision of the lower court to stand would in effect allow the Immigration and Naturalization Service to contravene its own regulations in respect to the conduct of deportation hearings. This issue not only affects the petitioner, but affects the rights of all aliens who are the subject of deportation hearings.

3. The denial of the petitioner's motion to take the deposition of the Vice Consul who issued the visa and the stenographer who typed the visa is in conflict with the decisions of this Court and raises questions of procedural due process which should be reviewed by this Court.

Petitioner testified that the visa application was completed by a typist in the consulate from the file and signed by him without his being specifically asked questions about his prior arrest and conviction. He testified that the preliminary questionnaire was signed by him in blank, and that if at any time he was specifically asked if he had ever been arrested or convicted that he would answer yes (Administrative Rec., pp. 10, 17, 18, 19, R-3, R-4).

The District Court rejected petitioner's contention that his failure to state his conviction was not wilful on the basis of the four-page statement wherein in answer to the question "Why did you claim you had never been arrested?" petitioner is alleged to have answered, "My Cuban papers were clear and I thought the question referred only to Cuba, the country where I was born and a citizen of." Petitioner testified that he was given the four-page statement and signed, assuming they were correct, as he did not have an interpreter with him at the time

(Administrative Rec., p. 11). Petitioner submits there was an issue as to fact which at the very least required a trial of the issue and that it was improper to grant summary judgment. Federal Rules of Civil Procedure, Rule 56(C). A deposition of the stenographer and of the Vice Consul was introduced into evidence with respect to the general practice of the office of the consulate to ask these specific questions of the visa applicant. Petitioner was not afforded the right of cross-examination or to take a deposition of the Vice Consul or stenographer.

In *Interstate Commerce Comm.* v. *Louisville & N. R. Co.*, 227 U. S. 88 (1912), it was held that an administrative body must fully apprise all parties of the evidence to be considered and must afford the party the right of cross-examination and an opportunity to offer evidence in explanation or rebuttal. *Interstate Commerce Comm.* v. *Louisville & N. R. Co.*, 227 U. S. 88 (1912); also see *Ohio Bell Teleph. Co.* v. *Public Utilities Comm.*, 301 U. S. 292 (1937).

In *Reilly* v. *Pinkus*, 338 U. S. 269, 70 S. Ct. 110 (1949), this Court enjoined the enforcement of a postal fraud order because the respondent's attorney was not permitted to cross-examine the government's witness in respect to statements in certain medical books. The Court said:

"Moreover, the issues in post office fraud cases makes such cross-examination particularly appropriate. Proof of fraudulent purpose is essential—an 'actual intent to deceive' ". 338 U. S. 269, 276, 70 S. Ct. 110, 114 (1949). The Court added " • • • But in this kind of case as in others, one against whom serious charges of fraud are made must be given a reasonable opportunity to cross-examine witnesses on the vital issue of his purpose to deceive". 338 U. S. 269, 276, 70 S. Ct. 110, 114.

While the depositions were admitted solely for the purpose of showing general practice, petitioner was entitled to establish that the general practice was not always carried

out, and it was error to deny him the right to examine or cross-examine the affiants. The presumption that the Public Officials perform their duties is rebuttable and falls when substantial evidence to the contrary appears. *Silverton* v. *Valley Transit Co.*, 237 F. 2d 143 (C. A. 9, 1956); *Baldwin* v. *Fidelity Fire Insurance Co. of New York*, 260 F. 2d 951 (C. A. 2d, 1958); also see *U. S.* v. *Ross*, 92 U. S. 281, 284 (1900); *District of Columbia* v. *Robinson*, 180 U. S. 92, 101, 102.

Since the basis of the proceedings is that the petitioner obtained the visa by fraud or by wilful misrepresentation of a material fact, it was particularly appropriate in this particular case to examine and cross-examine the persons concerned in the processing of the visa application in order that the facts and circumstances surrounding the issuance of the visa may be more fully developed. It is respectfully submitted that the denial of the petitioner's right to cross-examine or take a deposition of the Vice-Consul and stenographer is such an impairment of his rights as to require that the order of deportation should be set aside and that a new hearing be granted.

CONCLUSION

For the foregoing reasons we respectfully submit that this petition for a writ of certiorari should be granted.

Respectfully submitted,

MORTON SILFEN,
Attorney for Petitioner.

BRANDON & SILFEN,
Of Counsel.

APPENDIX

Opinion of United States District Court for the Southern District of New York

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 135-400

—o—

ENRIQUE ESTABAN GANDUXE y MARINO,

Plaintiff,

against

JOHN L. MURFF, District Director of the Immigration and Naturalization Service for the New York District,

Defendant.

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DIMOCK, *D. J.*

This is an action for declaratory judgment pursuant to section 10 of the Administrative Procedure Act, 5 U. S. C. § 1009, upon the conclusion of administrative proceedings, seeking judicial review of the order that plaintiff be deported under section 241(a)(1) of the Immigration and Nationality Act, 8 U. S. C. § 1251(a)(1).

Plaintiff moves for an injunction pendente lite restraining defendant from executing the order of deportation. Defendant cross-moves under Rule 56, F. R. Civ. P., for summary judgment dismissing the complaint.

Plaintiff is a thirty-year old alien, a native and citizen of Cuba. His deportation was ordered on the ground that his last entry into the United States was unlawful under section 212(a)(19) of the Immigration and Nationality Act,

66 Stat. 183, 8 U. S. C. § 1182(a)(19), because he had procured a visa by fraud or by wilfully misrepresenting material facts. The alleged misrepresentation was his statement before the Consul at Havana, Cuba, that he had never been arrested or convicted.

The facts were that, while a visitor to the United States, on November 14, 1953, in New York City, he had been arrested and thereafter convicted in the Magistrate's Court upon his plea of guilty to a violation of section 722 subdivision 8 of the Penal Law of the State of New York, in that, with intent to provoke a breach of the peace, he did loiter at 53rd Street and Third Avenue, for the purpose of inducing men to commit acts against nature or other lewdness. He was fined $25 or, in default of payment, was committed to imprisonment in City prison not to exceed ten days.

Thereafter plaintiff in Havana applied for a visa to permit his entry into the United States for permanent residence. His application was in writing and contained the statement that he had never been arrested or convicted. He obtained the visa and on the strength of it entered the United States at Tampa, Florida, on November 28, 1955 and was admitted for permanent residence.

On November 16, 1956, the Immigration Service served plaintiff with a warrant of arrest and an order to show cause why he should not be deported. On the previous day, November 15, 1956, plaintiff had been interviewed by an immigration officer and he had then voluntarily made a sworn statement which was recorded in writing and signed. In it he said that he had answered "never" to the question whether he had ever been arrested or convicted on his application for a visa because he believed that that question referred only to his record in Cuba. At the hearing he changed his story and said that he had not read the question and that no one had read it to him, the word

"never" having been filled in by a typing clerk at the American Embassy upon her referring to papers he had previously submitted to the Consulate.

The act to which plaintiff pleaded guilty was clearly one involving moral turpitude, United States v. Flores-Rodriguez, 2 Cir., 237 F. 2d 405, so that without more plaintiff would have been excludable and deportable. The so-called Sheepherders Act, 68 Stat. 1145, adopted in 1954, 8 U. S. C. § 1182a, however, provided that a first offense should not be the ground for exclusion if it were a misdemeanor classifiable as a petty offense under the provisions of section 1(3) of Title 18, United States Code, "by reason of the punishment actually imposed". Section 1(3) of Title 18 defines as a petty offense "[A]ny misdemeanor the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500 or both". Here the punishment was but $25 or ten days and thus well within the six months imprisonment and fine of $ 0 which are the limits of the class of petty offense under section 1(3) of Title 18 U. S. Code.

On November 23, 1955, the date plaintiff submitted his application for a visa to the Vice Consul in Havana, Cuba, section 212(a) of the Immigration and Nationality Act, 8 U. S. C. § 1182(a) stated:

> "Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission to the United States:
>
> • • •
>
> (4) Aliens afflicted with psychopathic personality • • •
>
> • • •

(9) Aliens who have been convicted of a crime involving moral turpitude (other than a purely political offense) * * *

* * *

(13) Aliens coming to the United States to engage in any immoral sexual act;

* * *

(15) Aliens who, in the opinion of the consular officer at the time of application for a visa, * * * are likely at any time to become public charges;

* * *

(19) Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by wilfully misrepresenting a material fact."

At that time section 241 of the Immigration and Nationality Act, 8 U. S. C. § 1251, provided as it still does that any alien in the United States should, on the order of the Attorney General, be deported who, "at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry".

It is clear that plaintiff is not deportable simply on the ground of his conviction. He is protected by the Sheepherders' Act. Hence the Immigration Service based the determination of his deportability upon the fact that he had procured a visa by fraud or by wilfully misrepresenting a material fact.

I reject plaintiff's claim that he signed his visa application without knowing that it stated that he had never been arrested or convicted. His first voluntary statement that he thought the question related to arrest or conviction in Cuba is utterly inconsistent with his later claim that he

did not know that he had signed a statement that he had never been arrested or convicted.

Thus his statement was false. The substantial question remains whether the misrepresentation was material.

If plaintiff had disclosed his arrest for loitering to solicit homosexual acts an attempt would almost certainly have been made to exclude him under subdivision (4) which excludes "aliens afflicted with psychopathic personality".

Senate Report No. 1137, 82nd Cong. 2nd Sess. explains, p. 9:

> "Existing law does not specifically provide for the exclusion of homosexuals and sex perverts. * * * The Public Health Service has advised that the provision for the exclusion of aliens afflicted with psychopathic personality or mental defect which appears in the instant bill is sufficiently broad to provide for the exclusion of homosexuals and sex perverts."

It might well be that any attempt to prove the plaintiff to be a homosexual would have been unsuccessful. He now presents a certificate from a physician that he is not a homosexual. Nevertheless, by the false statement that he had never been convicted of a crime, plaintiff succeeded in escaping an investigation by the Vice Consul as to whether or not he was a homosexual. A decision that an alien may make a false statement in his application for a visa in order to avoid the raising of a substantial question as to his eligibility and then, if he is caught in the false statement after having successfully choked off investigation, may try out his eligibility just as if nothing had happened would, it seems to me, be an invitation to false swearing. Judge Dawson in In re Field's Petition, D. C. S. D. N. Y., 159 F. Supp. 144, 147, stated that the rule

of this Circuit "is that not any misrepresentation warrants a finding of fraud or materiality, but that there must be a showing that the misrepresentation concealed facts which 'might well have prompted a final refusal' of the visa, or 'might have resulted in a proper refusal of the visa' ", citing United States ex rel. Jankowski v. Shaughnessy, 2 Cir., 1951, 186 F. 2d 580, 582 and United States v. Flores-Rodriguez, supra.

In the Field case the alien had failed to disclose in answer to a question as to her former places of residence that she had resided in Russia. She admitted that she did so because she feared that there would be an investigation as to Communist affiliation. As a matter of fact, she had no Communist affiliation. She was held not to be excludable despite the false statement in the application.

Materiality is a question of degree. Disclosure of residence in Russia for a year and a half is not nearly so likely to result in a refusal of a visa on the ground of membership in the Communist party as pleading guilty to loitering to solicit homosexual acts is to result in refusal of a visa on the ground that the alien is afflicted with psychopathic personality, i.e., is a homosexual.

Plaintiff was properly ordered deported.

Defendant's motion for summary judgment dismissing the complaint is granted.

Plaintiff's motion for an injunction pendente lite is dismissed.

Dated: March 28, 1959

E. J. Dimock
United States District Judge

Petitioner's Exhibit R 3

SILVANO ARIETI, M. D.
18 East 76th Street
New York 21, N. Y.

REgent 7-2483

January 15, 1957

Mr. Elmer Fried, Attorney
37 Wall Street
New York 5, New York

Dear Mr. Fried:

I am writing in reference to Mr. Henry Ganduxe, whom I examined on January 2, 1957. I also studied the report of the psychological tests performed on this patient by Mr. Alfred Gross.

According to both psychiatric and psychological examinations, Mr. Ganduxe does not suffer from any psychotic condition. He does not disclose either psychopathic behavior nor overt homosexual trends. He appears as a rather insecure, submissive person. Although under a state of intoxication some deeply unconscious trends may manifest themselves, it seems highly improbable to the undersigned that Mr. Ganduxe did what the police claim he did. Probably a great deal of misunderstanding occurred between the police and the patient on account of his linguistic difficulties, state of intoxication and suggestibility. Mr. Ganduxe claims that his interests are heterosexual ones and that he is unofficially engaged to a girl residing in Cuba.

Mr. Ganduxe is not suffering from a psychopathic disorder, nor is he affected by overt homosexuality.

Very truly yours,

SILVANO ARIETI, M. D.

SA:nm

Opinion of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 258—October Term, 1959

(Argued April 13, 1960 Decided April 13, 1960)

Docket No. 25658

ENRIQUE ESTEBAN GANDUXE Y MARINO,
Plaintiff-Appellant,

—v.—

P. A. ESPERDY, District Director of the Immigration and Naturalization Service for the New York District,
Defendant-Appellee.

Before:

LUMBARD, *Chief Judge,*
SWAN and CLARK, *Circuit Judges.*

Plaintiff appeals from a judgment of the United States District Court for the Southern District of New York, Edward J. Dimock, *J.*, granting the defendant's motion for summary judgment in an action to review a deportation order of the Attorney General. Affirmed.

MORTON SILFEN, New York, N. Y. (Brandon & Silfen, New York, N. Y., on the brief), for plaintiff-appellant.

Opinion of United States Court of Appeals for the Second Circuit

CHARLES J. HARTENSTINE, JR., Special Assistant United States Attorney, Southern District of New York, New York, N. Y. (S. Hazard Gillespie, Jr., United States Attorney, Southern District of New York, New York, N. Y., on the brief), for defendant-appellee.

PER CURIAM:

We affirm in open court on the opinion of Judge Dimock.

Interim Decision #953

MATTER OF C—T—P

In Deportation Proceedings

A-10344385

Decided by Board September 19, 1958

Misrepresentation—Section 212(a)(19) of the 1952 act—Materiality—Criteria for determining materiality in respect to visa application.

Misrepresentation in visa application concerning parentage, whereabouts of parents, and residence in China from 2 to 9 years of age, were not material and, hence, did not invalidate the visa, when the record does not establish that the misrepresentations concealed facts which either would have disclosed a ground of inadmissibility or "might well have prompted a final refusal of the visa."

(NOTE): This decision contains comprehensive discussion of materiality of misrepresentations in visa applications with review of judicial and administrative precedents.

CHARGES:

Order: Act of 1952—Section 241(a)(1) (8 U. S. C. 1251(a)(1))—Excludable at entry or visa procured by fraud.

Lodged: Refugee Relief Act of 1953—Section 7(b)—Ineligible for visa issued pursuant to section 4(a)(12) of Refugee Relief Act of 1953—Not a refugee as defined by Section 2(a) of the Refugee Relief Act of 1953.

BEFORE THE BOARD

DISCUSSION: The Assistant Commissioner, Investigations Division, requests that this Board withdraw its order of May 13, 1958, sustaining the respondent's appeal from

the special inquiry officer's order finding him deportable on the charge in the order to show cause. The Assistant Commissioner asks that the Board order the respondent's deportation upon the charge in the order to show cause. The special inquiry officer held that the Service had failed to sustain its burden of establishing that respondent was not a refugee and, therefore, the special inquiry officer found that the lodged charge was not supported. The Assistant Commissioner does not request that the alien be found deportable on the lodged charge. Counsel has submitted a reply brief asking that the motion be denied.

When the respondent applied for his visa, he furnished false information to the consul about his parentage, the whereabouts of his parents, and his residence in China from the ages of 2 years to 9 years. We held that these representations were not material because the respondent was a "refugee" when he applied for the visa and had the true facts been known, no ground of inadmissibility would have been revealed. The Service believes that any misrepresentation which would have led to further investigation and "which *might possibly* have led to the denial of the visa" should make the visa invalid.

We do not believe the Service contention can be upheld. The fact that further investigation was prevented does not make a misrepresentation material (*In re Field's Petition*, 159 F. Supp. 144, S. D. N. Y., 1958; *Matter of S—C—*, E 086114, Int. Dec. No. 763). The mere possibility of a refusal does not make a misrepresentation material. A review of the cases shows that in some situations it is the actual existence of a ground of inadmissibility and in others the *probable* existence of a ground of inadmissibility which makes the misrepresentation material.

The record must establish the actual existence of a ground of inadmissibility where the misrepresentation is concerning an objective matter, such as conviction for a

crime involving moral turpitude. In such cases, the conviction must be present and it must involve moral turpitude (*United States ex rel. Iorio* v. *Day*, 34 F. 2d 920, C. A. 2, 1929; *Matter of S—C—, supra*, pp. 16 and 17; but see *Ablett* v. *Brownell*, 240 F. 2d 625, C. C. A. D. C.). There are, however, grounds of inadmissibility which require the weighing and balancing of intangible factors before a determination can be made. In such cases, the limited nature of information available prevents the making of certain judgments and the consul must have some leeway in arriving at his determination. For example, a determination as to whether an applicant is a believer in a subversive doctrine; or a psychopathic personality; or one likely to become a public charge, cannot be established with the exactitude that can a ground of inadmissibility such as conviction for 2 or more offenses for which the aggregate sentences to confinement actually imposed were 5 years or more. In these situations where leeway exists, the rule has arisen that the record need not establish that the ground of inadmissibility actually exists. It is sufficient that the ground of inadmissibility probably exists. Thus, in *Matter of F—R—*, A-8401909, 6, I. & N. Dec. 813, the alien had concealed information which bore on the issue as to whether he was a person of constitutional psychopathic inferiority. The existence of the ground of inadmissibility was not established by the record but its probable existence was shown. We held that the misrepresentation was material because revelation of the true facts might well have prompted the refusal of a visa (*Matter of S—C—*, E-086114, Int. Dec. No. 763, pp. 17-18; *Matter of M—*, E-086095, Int. Dec. No. 791).

In re Field's Petition, supra, concerned an alien who, in applying for a visa, had concealed the fact that she had resided in Russia for a short period. The Department of State flatly said that had it known that the application contained a misstatement, the visa would not have been

granted (p. 146). At the time the case was heard in court, no particular ground of inadmissibility was shown to have existed at the time the visa was applied for. The court showed no concern with the fact that refusal of the visa was a possibility. The court was concerned only with the question whether the probability of refusal for reasons other than the fact that a misstatement existed was present. The following extracts from the case are pertinent:

> "The courts have distinguished from a fraudulent misrepresentation in an application for a visa and a misrepresentation that is irrelevant to the right of admission to this country * * *
>
> * * *
>
> The Court recognizes that there is an apparent disagreement among the courts as to whether a willful visa misrepresentation is always a material fraud where it may have the effect of hindering investigation of the applicant, or whether there must be a showing that the facts, if revealed, would have led to a denial of the visa. (Citations omitted.) This Court finds that the rule of this circuit, which appears to be the most appropriate rule, is that not any misrepresentation warrants a finding of fraud or materiality, but that there must be a showing that the misrepresentation concealed facts which 'might well have prompted a final refusal' of the visa, or 'might have resulted in a proper refusal of the visa.' *United States ex rel. Jankowski* v. *Shaughnessy*, 2 Cir., 1951, 186 F. 2d 580, 582; *United States* v. *Flores-Rodriguez*, 2 Cir., 1956, 237 F. 2d 405, 408. Such a showing may appear by the falsity in the visa application itself, as, for example, where the applicant falsely denies ever having been convicted of a crime involving moral turpitude, but where the non-disclosure is of the nature shown in this case

there must be a further showing of facts which would allow the Court to conclude that the misrepresentation was material.

The Immigration and Naturalization Service has done no more than to indicate that if the truthful answer had been made by the petitioner upon her visa application an investigation might have been instituted. They have offered nothing to show that an investigation might have resulted in a proper refusal of the visa. Under the tests which would be applied if the Government were to question the validity of petitioner's entry into the United States, there is every reason to believe that failure to answer in full this question on the application would not have impaired the validity of petitioner's entrance into this country.

The Court therefore concludes that petitioner has been legally admitted to this country for permanent residence and is eligible for naturalization . . . ."

We believe the rule stated in *Field* should be followed. It is the majority rule. It is the rule which has been followed since at least *Iorio* (1929) (*Matter of S—C—*, *supra*, p. 18). Years of settled judicial and administrative practice, taking into consideration the general background of immigrants, the fact that they are often ill-advised, the financial and emotional expense with which they have uprooted their ties in their native land, and the hardship of requiring the established ties in this land to be broken, require caution and consideration to be used in finding misrepresentations material when made in an application for a visa. Without condoning the making of misrepresentations, but bearing in mind that the factors we have set forth exist, we see no reason to abandon the conservative rule of the past and now subject to deportation all aliens

concerning whom *any* possibility of the denial of a visa existed. If the rule is to be changed, it should be done by the clear statements of the legislature or the courts and not be implications drawn from solitary case

We shall briefly comment upon some of the cases cited by the Service in support of its position. *United States* v. *Flores-Rodriguez*, 237 F. 2d 405, 408, 411, involved a prosecution for perjury on the part of the alien involved in *Matter of F—R—*, *supra*. In a perjury proceeding, anything is material which the Government official had the right to know. This test is not used in visa fraud cases. Moreover, *Flores-Rodriguez* is cited in *In re Field's Petition* in support of its position. *Ablett* v. *Brownell*, 240 F. 2d 625, involved concealment of the convictions of 2 crimes. One crime clearly involved moral turpitude. This would have justified refusal of the visa. The other crime presented a question of real difficulty as to whether it involved moral turpitude. The court held that the visa had been obtained by fraud. If it is the court's view that concealment of a fact which, if revealed, would have led to a temporary refusal while an investigation was conducted is sufficient to constitute the obtaining of the visa by fraud, irrespective of what a final investigation would reveal, we do not think that it represents the majority rule. We note that *In re Field's Petition* held that a misrepresentation was not material although a "truthful answer might have induced the Consul to have instituted an investigation (a temporary refusal!). *Duran-Garcia* v. *Neely*, 246 F. 2d 287 (C. A. 5, 1957), cited by the Service, was considered by the court in the *Field* case as being in "apparent disagreement" with *Iorio* which states the majority rule. The language is broad but it must be noted that *Duran-Garcia*, involving an application for temporary admission which the court found embraced a material misrepresentation, shows that the alien concealed the fact that she was actu-

ally entering to take employment—a purpose inconsistent with an application for temporary admission and a ground of inadmissibility. The alien also concealed the fact that she had previously been compelled to leave the United States because of a violation of her temporary immigration status. The first matter concealed would have required her exclusion as a visitor. The second matter could well have prevented her entry on the ground she was not a bona fide visitor. Thus, the probability that the alien was within a class excluded by law was greater than the probability that she was a bona fide immigrant.

Corrado v. *United States*, 227 F. 2d 780, cert. den. 351 U. S. 925, is also cited by the court in *In re Field's Petition* as being in apparent opposition to *Iorio*. The test of materiality in denaturalization cases is not that which is found in immigration cases. In *United States* v. *Chandler*, 152 F. Supp. 169, 177, a denaturalization case, the court stated the test was "not whether naturalization would have been refused if defendant had revealed the truth, but whether, by his false answers, the Government was deprived of the opportunity of investigating the facts relating to his eligibility." This test was rejected in immigration misrepresentation cases except in "identity" cases (*Matter of S—C—, supra*). The requirements for admission to citizenship are different than the requirements for the issuance of a visa, and materiality in one case is not necessarily materiality in another.

Administrative precedents referred to in the Service motion do not establish a different standard than that which we have described.

The factual situation was carefully considered by this Board and we found it proper to agree with the special inquiry officer that the Service had not established that the respondent was not a refugee entitled to the issuance of the visa, and we note that in this motion the Service does

not ask for deportation on the charge that respondent was not a refugee. We do not believe the record establishes that the misrepresentation concealed facts which "might well have prompted a final refusal" of the visa.

In order to summarize the situations existing in misrepresentation cases and to answer the contentions of the Service without extending this order unduly, we shall state the rules applicable to misrepresentation cases other than those involving identity:

(1) In a deportation proceeding, whether or not the visa would have been issued had the true facts been known is a matter for the immigration authorities in the United States and not for the consul who issued the visa (*Matter of M—*, A-7099059, 4, I. & N. Dec. 532; *Matter of S—C—*, E-086114, Int. Dec. No. 763; *In re Field's Petition*, 159 F. Supp. 144, 146).

(2) The Service has the burden of establishing the existence of the grounds making the alien ineligible for the issuance of a visa, and it has the burden of establishing that there was a willful misrepresentation. (*Matter of S—C—*, *supra*, p. 3; *In re Field's Petition, supra; see Matter of G—G—*, A-8949107, Int. Dec. No. 784).

(3) If the misrepresentation is concerning an objective matter which is a ground of inadmissibility, such a conviction for crime involving moral turpitude, then the objective fact must exist. The conviction must be present and it must involve moral turpitude.

(4) If the misrepresentation is concerning a ground which requires a weighing and balancing of intangible factors giving the consul measure of discretion, as for example, whether an applicant is a

believer in a subversive doctrine, or a psychopathic personality, or one likely to become a public charge, then it is not necessary that the record establish that the ground actually did exist. It is sufficient if the record establishes that the ground of inadmissibility probably existed.

ORDER: It is ordered that the motion be and the same is hereby denied.